UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS W. STOKES,	
Petitioner,	
- against -	**OPINION AND ORDER**
UNITED STATES OF AMERICA,	**00 CIV. 1867 (SAS)**
Respondent.	

SHIRA A. SCHEINDLIN, U.S.D.J.:

Pro se petitioner Thomas W. Stokes moves to vacate, set aside, or correct his federal sentence pursuant to 28 U.S.C. § 2255. Petitioner raises three grounds for relief: (1) the Government allegedly suborned perjury; (2) the Court failed to resolve disputed issues concerning factual inaccuracies in the presentence report ("PSR"); and (3) petitioner received ineffective assistance of counsel. For the foregoing reasons, petitioner's motion is denied.

I. BACKGROUND

On April 24, 1997, petitioner was charged in a nine-count indictment with participating in a scheme to sell fraudulent or nonexistent bank documents. On June 5, 1997, a jury convicted petitioner on all nine counts, consisting of conspiracy to commit fraud in violation of 18 U.S.C. § 371, wire transfer of fraudulently obtained money in violation of 18 U.S.C.

§ 2314, wire fraud in violation of 18 U.S.C. § 1343, money laundering in violation of 18 U.S.C. § 1956(a)(2)(A), and criminal forfeiture pursuant to 18 U.S.C. § 982(a)(1). Throughout the trial, petitioner was represented by Steven Statsinger, Esq., an attorney in the Legal Aid Society Public Defender Division.

The evidence at trial established that from July 1993 until April 1996, Stokes and his co-conspirators -- Howard Judah and Gene Alten -- defrauded a series of victims out of more than $2.75 million, and attempted to defraud others out of approximately $20 million. The scheme involved Stokes' claim that through various personal connections in the banking industry, he could purchase and sell "prime bank guarantees" or letters of credit and make a substantial profit in a short period of time, with no risk to the investor. However, rather than invest the large sums of money he received from his clients, Stokes and his co-conspirators laundered the money. Through this scheme, Stokes and his co-conspirators defrauded Earl and Norma Cheek of $50,000; The Rose's Stores, Inc. of $607,500; Ernst Heinsius of $1.2 million; and Renata Haag of $900,000. Stokes also attempted to defraud Dr. Lazlo Tauber and Raymond Keith Richards of $10 million each.

Nonetheless, Stokes attempted to depict himself as a

victim, unwittingly conned by Judah and Alten to perpetrate a fraud of which he was ignorant. Stokes did not present a defense case. Although he intended to call one witness, Thomas Stava, a tax accountant from Nevada, Stava was unavailable at the time of the defense case. The Court denied Stokes' request for a continuance.

After his conviction but prior to his sentencing, Stokes wrote a letter complaining that he had "received virtually no representation from counsel" and that "[t]his is clearly reflected in the record." 9/12/97 Letter from Thomas W. Stokes ("9/12/97 Stokes Letter"), Ex. III to Petitioner's Memorandum Brief in Support of Motion to Vacate[,] Set Aside[,] or Correct Sentence Pursuant to Title 28 United States Code, Section 2255 ("Pet. Mem."), at 2. Petitioner claimed that although he had submitted to his attorney "over fifteen potential witnesses," "[n]ot one single witness was called to testify." Id. at 1. Stokes sought the appointment of new counsel and requested "time to review and correct the PSR as it contains numerous inconsistencies with the facts." Id. On September 22, 1997, Stokes sent the Probation Department a letter in response to the PSR. See 9/22/97 Letter from Thomas Stokes to Probation Department ("9/22/97 Stokes Letter"), Ex. IV to Pet. Mem.

A sentencing hearing was held on October 21, 1997. Stokes was represented by his newly-appointed counsel, John P.

Cooney, Esq. At sentencing, Cooney argued against an enhancement for obstruction of justice and moved for a downward departure. See 10/21/98 Sentencing Transcript ("Sent. Tr.") at 8-19. The Court rejected both the obstruction of justice enhancement and the downward departure request. See id. at 22-25. The Court sentenced Stokes to seventy-eight months in custody, three years of supervised release on each count to run concurrently, a $450 mandatory assessment, and $50,000 of restitution to the Cheeks to be paid by the end of the period of supervised release. See id. at 30.

On October 30, 1997, Stokes, represented by Cooney, filed a notice of appeal. The sole argument raised on appeal concerned the Court's decision to deny a continuance to permit Stokes' sole witness to testify. On September 29, 1998, the Second Circuit Court of Appeals affirmed Stokes' conviction. See United States v. Stokes, 164 F.3d 620 (2d Cir. 1998) (unpublished opinion).

Nearly one year later, on September 24, 1999, Stokes, appearing pro se, filed a "Rule 32(c)(3)(D) Motion" seeking to correct, strike, and redact erroneous portions of the PSR. On March 10, 2000, then-Chief Judge Thomas P. Griesa notified petitioner that his action would be construed as one for relief under 28 U.S.C. § 2255. The redesignated habeas petition was subsequently assigned to this Court. On April 11, 2000,

petitioner filed a motion requesting that the Court "not recharacterize" the action as one for habeas relief. Petitioner's motion was denied on April 18, 2000, and petitioner was granted until July 19, 2000 to file an amended petition.

II. DISCUSSION

Section 2255 provides that a court shall hold an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. "'Conclusory allegations unsupported by specifics are insufficient to require a court to grant an evidentiary hearing, as are contentions that in the face of the record are wholly incredible." Panton v. United States, No. 98 Civ. 1881, 1999 WL 945523, at *2 (S.D.N.Y. Oct. 18, 1999) (quoting Hopkinson v. Shillinger, 866 F.2d 1185, 1211 (10th Cir. 1989)); see also Paulino v. United States, No. 97 Civ. 2107, 1998 WL 214877, at *2 (S.D.N.Y. Apr. 28, 1998) ("Petitioner's unsupported, conclusory allegations are insufficient to require an evidentiary hearing on a habeas corpus petition."). A district court may rely on its own familiarity with the case and deny the motion without a hearing if the court concludes that the motion lacks "meritorious allegations that can be established by competent evidence." United States v. Aiello, 900 F.2d 528, 534 (2d Cir. 1990) (quotation marks omitted).

A. Procedural Default

It is well-established that a section 2255 petition is not a substitute for an appeal. See Panton, 1999 WL 945523, at *2 (citing United States v. Frady, 456 U.S. 152, 165 (1982)). A petitioner who fails to raise an issue on direct appeal is barred from raising it in a section 2255 proceeding, unless he can first demonstrate either "cause" for his failure and actual "prejudice" arising from that failure, or that he is "actually innocent." Bousley v. United States, 523 U.S. 614, 622 (1998); see also De Jesus v. United States, 161 F.3d 99, 102 (2d Cir. 1998); Billy-Eko v. United States, 8 F.3d 111, 113-14 (2d Cir. 1993) (superceded by statute on other grounds).

Here, petitioner admits that he has not raised on direct appeal any of the three claims raised in this section 2255 motion. See Petitioner's Memorandum of Law Refuting the Government's Brief in Opposition to Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Title 28 United States Code Section 2255 ("Pet. Reply Mem.") at 2 ("Grounds for relief cited in the Motion were not raised on direct appeal."). Therefore, he has procedurally defaulted on these claims unless he can demonstrate cause and actual prejudice or that he is actually innocent.

1. Cause and Actual Prejudice

The "cause" prong requires a petitioner to show that some objective factor external to the petition impeded his efforts to raise the claim earlier. See Murray v. Carrier, 477 U.S. 478, 492 (1986); Trupin v. United States, No. 99 Civ. 105, 2000 WL 145102, at *4 (S.D.N.Y. Feb. 3, 2000). "Examples of 'external' causes include 'interference by officials,' ineffective assistance of counsel, or that 'the factual or legal basis for a claim was not reasonably available' at trial or on direct appeal." Trupin, 2000 WL 145102, at *4 (quoting Murray, 477 U.S. at 488).

"Actual prejudice" requires more than a showing "that the errors at his trial created a possibility of prejudice"; rather, a petitioner must establish that the alleged errors "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Femia v. United States, 47 F.3d 519, 524 (2d Cir. 1995). In fact, "a petitioner must show 'a reasonable probability that, but for the alleged violation of federal law, the result of the trial would have been different.'" Trupin, 2000 WL 145102, at *4 (alterations omitted) (quoting Mathis v. Hood, 937 F.2d 790, 794 (2d Cir. 1991)).

Petitioner has not alleged any cause for his failure to raise his first two claims -- that the prosecution suborned perjury and that the Court did not resolve factual disputes in

the PSR –- on appeal. Therefore, these two claims are procedurally barred unless petitioner makes an adequate showing of actual innocence.

However, the Second Circuit has made clear that petitioner's third claim –- that trial counsel was ineffective –- must be analyzed differently than other constitutional claims. Generally, the presumption is that a claim of ineffective assistance of counsel can be raised on a § 2255 motion, even though it was not raised on appeal. See Billy-Eko, 8 F.3d at 114 ("Primarily, though, ineffective assistance claims are appropriately brought in § 2255 petitions even if overlooked on direct appeal because resolution of such claims often requires consideration of matters outside the record on direct appeal."). However, no such presumption is appropriate where the petitioner was represented by new counsel on appeal and where the grounds supporting his claim were apparent from the trial record. See id. at 115; Chacko v. United States, No. 00 Civ. 405, 2000 WL 1808662, at *4 (S.D.N.Y. Dec. 11, 2000) (holding that petitioner is procedurally barred from raising ineffective assistance of counsel claim where it was not raised on appeal); Massaro v. United States, No. 97 Civ. 2971, 2000 WL 1761038, at *4 (S.D.N.Y. Nov. 29, 2000) (same). "Unjustified delay in bringing [ineffective assistance claims based solely on the record developed at trial] will still result in a cause and prejudice

standard being applied." Billy-Eko, 8 F.3d at 116.

Petitioner was represented by new counsel on appeal. Furthermore, an ineffective assistance of counsel claim could have been brought solely on the record. Petitioner's primary complaint here is that his attorney did not call any witnesses to testify on his behalf even though petitioner had provided him a list of potential witnesses. Indeed, in the 9/12/97 Stokes Letter, petitioner argued that trial counsel's ineffectiveness was "clearly reflected in the record." See supra Part I.

However, petitioner has not shown any good cause for his failure to raise an ineffective assistance of counsel claim on appeal. Petitioner contends that, although he sought to claim an ineffective assistance of counsel claim on appeal, "[i]t was the opinion of counsel not to appeal on that issue." Pet. Reply Mem. at 24. But petitioner does not contend that appellate counsel was ineffective. The mere fact that he was unsuccessful on appeal and did not raise every claim urged by the petitioner does not constitute ineffective assistance of counsel. "'Negligence or error in failing to raise the claim are not sufficient to show cause.'"[1] Villegas v. United States, 96 Civ.

[1] Any claim that appellate counsel provided ineffective assistance at sentencing is equally unpersuasive. At sentencing, Cooney argued successfully against an enhancement for obstruction of justice. Furthermore, his zealous advocacy is demonstrated by his attempt to secure a downward departure -- a request which this Court ultimately rejected.

1419, 1997 WL 35510, at *3 (S.D.N.Y. Jan. 30, 1997) (quoting United States v. MacDonald, 966 F.2d 854, 859 (4th Cir. 1992)).

2. Actual Innocence

Nevertheless, petitioner contends that the claims are properly raised in this motion because "[t]here exists sufficient critical evidence to support that . . . Petitioner is innocent of the crime as charged." Pet. Reply Mem. at 2. Specifically, petitioner contends that he provided his attorney with the names of over fifteen individuals who would have testified on his behalf. See id. at 22. These fifteen individuals would have allegedly offered testimony which supports Stokes' claim that his prime bank guarantee venture was undertaken in good faith and without an intent to defraud.[2]

The actual innocence standard is satisfied only "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. The "actual innocence" standard raises a higher hurdle than the "prejudice" prong of the cause and prejudice standard. The petitioner "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'" Bousley, 523 U.S.

[2] In contrast to petitioner's prolix reply memorandum of law, which names fifteen individuals who would have testified on his behalf, petitioner's memorandum of law only names three individuals who would have testified on his behalf.

at 1611 (quotation marks omitted). "Actual innocence means factual innocence, not mere legal insufficiency." Id. "To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995). The standard is exceedingly difficult to meet, and only the few motions "implicating a fundamental miscarriage of justice" will satisfy the standard. Id. at 315.[3]

Based on this record, it is patently clear that petitioner cannot satisfy this actual innocence standard. First, except for the affidavit of Herbert Bernstein, petitioner has not submitted any other affidavit concerning what these witnesses would have stated in their testimony. His assertions concerning what they would have testified to are unsupported, and thus not persuasive.[4] See Johnson v. Edwards, No. 96 Civ. 3658, 1997 WL

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[3] Proving actual innocence is even more difficult where a petitioner has been convicted by a jury and thus "comes before the habeas court with a strong -- and in the vast majority of cases conclusive -- presumption of guilt." Schlup, 513 U.S. at 326 n.42.

[4] Indeed, an examination of Bernstein's affidavit reveals that petitioner's representations concerning what Bernstein would have stated had he testified are greatly exaggerated. Petitioner maintains that "Bernstein is an attorney familiar with prime bank guarantee transactions and was an integral part of [petitioner's] due diligence on the proposed transaction. Mr. Bernstein also

599402, at *5 (S.D.N.Y. Sept. 29, 1997) (petitioner's assertion of proposed witness testimony "would be more persuasive if it were supported by an affidavit. Without any statement by [the potential witness], it is difficult to say what her testimony would be").

Second, assuming, arguendo, that the fifteen witnesses would testify in the manner asserted by petitioner, their testimony does not provide new evidence of petitioner's actual innocence. These witnesses would have merely offered testimony supporting, at best, a weak inference that petitioner acted in good faith. For instance, petitioner alleges that W.T. Bryan

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vouched for the professional capabilities of attorney Eugene J. Alten." Pet. Mem. at 9. However, Bernstein's affidavit does not support petitioner's representations:

> Mr. Stokes did make a few telephone calls from my residence, presumably to Mr. Cheeks [sic] although I did not personally speak to Mr. Cheeks [sic]. I am familiar with bank notes. I am familiar especially with Medium Term Notes (MTNs) which people confuse with prime bank guarantees. Although these financial instruments are different, the language is used interchangeably, if not incorrectly. I did speak with a Eugene J. Alten who confirmed to me at that time he was an attorney in good standing. I did not independently verify that information; I accepted his word as such. I would have been available to testify if called at the trial of Thomas Stokes, but I was never asked or requested to do so.

7/18/00 Affidavit of Herbert J. Bernstein, Esq., Ex. VIII to Pet. Mem. (emphasis added).

would have offered "critical" testimony that after $100,000 was returned to Cheek, petitioner's concern for Cheek led to petitioner signing a promissory note for $1 million to be paid in one year. See Pet. Reply Mem. at 5-6 ("This testimony would have been critical as it relates to Petitioner's state of mind, his intent, and his subsequent actions taken."). However, not only is this not a new fact,[5] when examined in context, this fact supports an inference that plaintiff acted with fraudulent intent –- not good faith -- as the Government persuasively argued during summation.[6] Ultimately, none of the fifteen witnesses would have

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[5] Cheek also testified to Stokes' signing the promissory note. See 5/29/97 Trial Transcript ("5/29/97 Trial Tr.") at 97.

[6] During summation, the Government argued:

> What about Mr. Cheek's remaining $50,000? . . . Mr. Stokes had always told him that he could get all $150,000 of his money back if he wanted to withdraw from the investment at any time. Did Stokes give back the $50,000? No, of course not. He told Mr. Cheek . . . he would be willing to sign a promissory note that would give Mr. Cheek one million dollars within a year, or, if not the million dollars, then the 50,000.
>
> Mr. Cheek testified that he signed that promissory note because he had no choice, since Stokes wasn't returning his $50,000. Now, of course, you know that Stokes was lying when he told Mr. Cheek he didn't have the $50,000 to return. You have seen Stokes'[] bank records. He had more than enough to give him back the money, but he just didn't want to.

6/4/97 Trial Transcript ("6/4/97 Trial Tr.") at 915.

presented strong enough a case controverting the Government's overwhelming evidence from which a reasonable jury could infer petitioner's fraudulent intent.

Having failed to show that the testimony of these fifteen individuals would have made it "more likely than not that no reasonable juror would have convicted him," Bousley, 523 U.S. at 1611, petitioner is procedurally barred from raising any of his three claims in this section 2255 motion. Even if petitioner were not procedurally barred from raising these claims, none of his claims have any merit.

B. The Merits of Petitioner's Claims

1. The Government Suborned Perjury

The threshold inquiry for an allegation of perjury is that "newly discovered evidence indicates that testimony given at trial was perjured." United States v. Wong, 78 F.3d 73, 81 (2d Cir. 1996); see also United States v. Moore, 54 F.3d 92, 99 (2d Cir. 1995) (citations and quotation marks omitted). If this is shown, "the grant of a new trial depends on 'the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury.'" Wong, 78 F.3d at 81 (quoting United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991)). Where the prosecution was unaware of the perjury, "a new trial is warranted only if the testimony was material and the

court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." Wong, 78 F.3d at 81 (quotation marks, citations and alterations omitted); see also United States v. Sasso, 59 F.3d 341, 350 (2d Cir. 1995). However, "[w]here the prosecution knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Wallach, 935 F.2d at 456 (citations and quotation marks omitted).

Petitioner claims that the Government suborned perjury from Cheek in two instances. First, Cheek testified he had not known about a trust Stokes had created until Stokes informed him of it in October 1993. See 5/29/97 Trial Tr. at 71. Stokes claims that this was false testimony because he and Cheek executed a document in August 1993, which included a statement that Alten was being paid "to organize the proper trust document on our behalf." 8/5/93 Promissory Note Provision, Ex. V to Pet. Mem., at 1. Second, Cheek testified that after $100,000 was returned to him, he released Alten and Judah –- but not Stokes -- from liability. See 5/29/97 Trial Tr. at 94. Stokes, however, submits a copy of a release from Cheek. See 6/15/98 Release, Ex. VII to Pet. Mem.

Neither of petitioner's allegations of perjury are meritorious. First, petitioner has not presented any "newly

discovered evidence" of Cheek's perjury. As a signatory or recipient of both documents that prove Cheek's alleged perjury, petitioner knew of the alleged perjury at trial, and could have impeached Cheek's testimony. See United States v. White, 972 F.2d 16, 20 (2d Cir. 1992) (stating that "newly discovered evidence" is evidence which "could not with due diligence have been discovered before or during the trial").

Second, this evidence of perjury is merely "cumulative, that is simply additional evidence to that which was presented at trial as to a fact, or unique evidence that tends to prove a fact at issue." Id. at 21. On cross-examination, Stokes' attorney elicited testimony from Cheek that demonstrated that an August 6, 1993 document references the "World Alliance Trust." See 5/29/97 Trial Tr. at 123. Similarly, with respect to the Stokes release, the Government's redirect established that Cheek also executed a release for Stokes, not just for Judah and Alten.[7] See Tr. at 143-44. It is precisely "the sort of cumulative impeachment material that is routinely held insufficient to warrant a new trial because it does not undermine the confidence in the verdict." Wong, 78 F.3d at 82 (citations and quotation marks

[7] In fact, Cheek did not deny that he executed a release for Stokes; rather, he stated that the Stokes release followed that given to Judah and Alten. Had Cheek testified that he had not released Stokes, but only released Judah and Alten, this would have supported a defense that Stokes was an unwitting agent of Judah and Alten.

omitted).

Third, petitioner has not established a "reasonable likelihood" that the alleged perjury could have affected the jury's verdict. Throughout his cross examination, defense counsel attacked Cheek's credibility and attempted to demonstrate that Stokes acted in good faith. Furthermore, Cheek was one of several investors who testified at trial. These circumstances militate against a finding that petitioner has satisfied the "reasonable likelihood" standard:

> No doubt, new impeachment evidence may satisfy the "reasonable likelihood" standard where a conviction depends on the testimony of a single government witness, or on a witness whose credibility was not attacked on cross-examination. But where independent evidence supports a defendant's conviction, the subsequent discovery that a witness's testimony at trial was perjured will not warrant a new trial.

Wong, 78 F.3d at 82 (citations omitted).

2. Inaccuracies in the PSR

Stokes contends that the Court failed to resolve disputed factual issues and sentenced him based on "numerous factual inaccuracies" in the PSR by which "the prosecution . . . sought to portray [petitioner] as a major violator of U.S. laws." Pet. Mem. at 22. Petitioner, therefore, requests that the Court order the U.S. Probation Service to correct the PSR. See id. at 21-22.

Courts have long recognized that a defendant has the right not to be sentenced on the basis of "'material false assumptions as to any facts relevant to sentencing.'" United States v. Ursillo, 786 F.2d 66, 69 (2d Cir. 1986) (quoting United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970)). Rule 32 of the Federal Rules of Criminal Procedure includes several requirements to prevent this from occurring. For instance, the defendant and his counsel must receive a copy of the PSR not less than thirty-five days before the sentencing hearing. See Fed. R. Crim. P. 32(b)(6)(A). At sentencing, the judge must verify that the defendant and his counsel have read and discussed the PSR. See Fed. R. Crim. P. 32(c)(3)(A). Additionally, where the defendant or his counsel allege any factual inaccuracies in the PSR, the judge must either make a finding concerning the objection or a determination that such a finding is unnecessary because the controverted matter will not be taken into account in sentencing. See Fed. R. Crim. P. 32(c)(1).

The record makes clear that the Government and the Court complied with the required procedures. The United States Probation Department forwarded a copy of the PSR to Stokes on August 5, 1997. Then, on October 21, 1997, the Court held a sentencing hearing wherein Stokes and his attorney were provided the opportunity to comment on the factual accuracy of the PSR. Rather than challenge its factual accuracy, defense counsel

argued against an enhancement for obstruction of justice and moved for a downward departure. See supra Part I. When the Court asked Stokes whether he had any objections, other than legal objections, to "anything contained in" the PSR, Stokes replied: "Not at this time, no." See Sent. Tr. at 6. The Court then "adopt[ed] the findings of fact as set forth in the presentence report." Id. at 27.

Moreover, Stokes had the opportunity to review the PSR and to contest at sentencing any factual inaccuracies contained in it. Having failed to contest the PSR's factual inaccuracies, petitioner cannot now argue that these alleged factual inaccuracies warrant relief under section 2255. See Ursillo, 786 F.2d at 71 ("[O]ver one year after sentencing, from which no appeal was taken, appellant sought to require the district court to correct statements in his presentence report that he had either already unsuccessfully challenged in some form, or that he could have raised more specifically at an appropriate time but did not. On this record, we believe that the district court did not err in refusing to grant appellant the relief he sought.); see also United States v. Khan, 835 F.2d 749, 754 (10th Cir. 1987) ("Due process does not require reconsideration of a sentencing decision when the defendant is given a full and fair opportunity to reveal inaccuracies in the information relied upon by the sentencing court and fails to do so.") (citations and

quotations marks omitted); Arias v. United States, No. 89 Civ. 2034, 1989 WL 131189, at *2 (E.D.N.Y. Oct. 16, 1989) ("When the defendant had an opportunity to review the [PSR] prior to sentencing, 'post-sentence motions to correct alleged inaccuracies contained therein may be denied.'") (quoting Inzone v. United States, 707 F. Supp. 107, 108 (E.D.N.Y. 1989)).

3. Ineffectiveness of Counsel

To prevail on a claim of ineffective assistance of counsel, a petitioner must satisfy the two-part test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). A petitioner must show that (1) his attorney's representation fell below "an objective standard of reasonableness," id. at 688, and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Under the first prong of the Strickland test,

> [t]he court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," bearing in mind that "[t]here are countless ways to provide effective assistance in any given case" and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way."

United States v. Aguirre, 912 F.2d 555, 560 (2d Cir. 1990) (quoting Strickland, 466 U.S. at 689). "The court's central concern is not with 'grading counsel's performance,' but with

discerning 'whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.'" Id. at 561 (2d Cir. 1990) (alterations and citations omitted) (quoting Strickland, 466 U.S. at 696-97). Therefore, "[a]ctions or omissions by counsel that 'might be considered sound trial strategy' do not constitute ineffective assistance." Mason v. Scully, 16 F.3d 38, 42 (2d Cir. 1994) (quoting Strickland, 466 U.S. at 689).

Petitioner contends that his counsel was ineffective because no witnesses testified on his behalf. He states: "[d]efense counsel in this instant case prepared no defense strategy. He sought no defense witnesses, failed to properly interview even substantial witnesses named by Petitioner, of the ones named herein, some were not ever contacted by counsel for the defense."[8] Pet. Reply Mem. at 24. However, as with his

[8] As part of his ineffective assistance of counsel claim, petitioner contends that the Government withheld exculpatory evidence by failing to introduce at trial a letter of credit he established and by ignoring exculpatory evidence from Bruce Beckner's deposition discussing his role in transferring funds and establishing letters of credit for Stokes. See Pet. Mem. at 16; Pet. Reply Mem. at 15. First, this is alleged misconduct by the Government, not his attorney, and thus cannot support a claim of ineffective assistance of counsel. Second, these allegations do not allege a violation of Brady v. Maryland, 373 U.S. 83 (1963). See United States v. Zackson, 6 F.3d 911, 918 (2d Cir. 1993) ("Evidence is not 'suppressed' if the defendant either

claim of actual innocence, petitioner offers only conclusory allegations, unsupported by competent evidence. See Clark v. Garvin, No. 99 Civ. 9075, 2000 WL 890272, at *5 (S.D.N.Y. June 30, 2000) (rejecting petitioner's claim that counsel did not investigate case properly where "[n]othing in the record supports this contention"). Moreover, petitioner's claims that his attorney prepared no defense and sought no defense witnesses are belied by the record. Stokes' counsel zealously advocated on his client's behalf throughout the trial, expounding the defense that Stokes had not acted with the requisite scienter. Counsel also sought to have Stava testify, but Stava was unavailable when needed.

Petitioner's contention that his counsel's decision not to call any witnesses was unwise is based on hindsight. See Aiello, 900 F.2d at 534 ("Simply because [petitioner] is in hindsight dissatisfied with the jury verdict in no way implies a lapse of representation."); Miller v. United States, No. 00 Civ. 2469, 2000 WL 1050584, at *5 (S.D.N.Y. July 28, 2000) ("When assessing an attorney's performance under the Sixth Amendment, a

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knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence."). Petitioner does not allege that the Government withheld from him exculpatory evidence, but rather, that the Government should have disclosed it to the jury. Indeed, petitioner was present at Beckner's deposition and either knew, or should have known, of the letters of credit. See Deposition of Bruce Beckner, Ex. IX to Pet. Mem., at 3.

court, operating with the benefit of hindsight, should not attempt to decide whether an alternative course of action might have led to a more favorable result for the petitioner."). Furthermore, counsel's decision was sound trial strategy at the time it was made. These witnesses would have added little, if anything, from which a reasonable juror could conclude that Stokes acted in good faith. Indeed, the witnesses' testimony could have been used by the Government to demonstrate that Stokes acted deliberately in planning such a complicated scam, thereby making it even more likely that a jury would find fraudulent intent. "The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial," and if reasonably made, will not support a claim of ineffective assistance of counsel. United States v. Eisen, 974 F.2d 246, 265 (2d Cir. 1992) (quotation marks and citation omitted); see also Chacko, 2000 WL 1808662, at *7 ("The decision to put on witnesses is a strategic decision within the discretion of trial counsel."); Pitre v. United States, 834 F. Supp. 128, 131 (S.D.N.Y. 1993) ("[T]rial counsel's decision to call particular witnesses or to pursue various defense strategies is precisely the type of tactical decision which is within the professional and 'virtually unchallengable' province of trial counsel."). Accordingly, petitioner has not satisfied the

Strickland test.

III. CONCLUSION

For the reasons stated above, Stokes' petition pursuant to 28 U.S.C. § 2255 is denied. Because petitioner has failed to make a substantial showing that he was denied a constitutional right, this Court will not issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2); see also Lucidore v. New York State Division of Parole, 209 F.3d 107, 112 (2d Cir. 2000) (holding that substantial showing exists where (i) the issues involved in the case are debatable among jurists of reason, or (ii) a court could resolve the issues in a different manner, or (iii) the questions are adequate to deserve encouragement to proceed further). The Clerk of the Court is directed to close this case.

SO ORDERED:

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Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
January ___, 2001

- Appearances -

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